76-1387

Supreme Court, U. S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STEVE LEPPKE,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

AUTHORITIES

Cases:

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PETITION FOR WRIT OF CERTIORARI

Your Petitioner, Robert Steve Leppke, prays that a writ of certiorari issue to review judgment of the Court of Criminal Appeals of the State of Oklahoma, entered in said case on January 24, 1977.

OPINIONS BELOW

The judgment of the District Court of Washington County, Oklahoma, is not reported. The opinion of the Court of Criminal Appeals, State of Oklahoma as reported at — (See Appendix "A").

JURISDICTION

The Judgment of the Court of Criminal Appeals was entered on the 24th day of January, 1977. That the Petitioner filed his petition for rehearing on the judgment and sentence rendered against him on the 24th day of January, 1977, which was heard and overruled by the Court of Criminal Appeals of the State of Oklahoma, on February 8, 1977. The jurisdiction of this Court is invoked under Title 28 U.S.C.A., Section 1257-3 and the rules of the Supreme Court, Rule 19.

QUESTIONS PRESENTED

PROPOSITION I
DID THE TRIAL COURT VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS OF DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL AS SET FORTH IN THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

CONSTITUTION AND STATUTES INVOLVED

Title 22, O.S.A., Section 384, 584:

§384. NAMES OF WITNESSES INDORSED ON INDICTMENT.

When an indictment is found, the names of the witnesses examined before the grand jury must be endorsed thereon before the same is presented to the court, but a failure to so endorse the said names shall not be sufficient reason for setting aside the indictment if the district attorney or prosecuting officer will with-

in a reasonable time, to be fixed by the Court, endorse the names of the witnesses for the prosecution on the indictment. Provided that the names of witnesses examined before the grand jury on matters not concerning the indictment in question shall not be endorsed on the indictment relative to such case. The court or judge may, at any time, direct the names of additional witnesses for the prosecution to be endorsed on the indictment, and shall order that such names be furnished to the defendant or his counsel.

§584. POSTPONEMENT FOR CAUSE

When an indictment or information is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, as in civil cases, direct the trial to be postponed to another day in the same or next term.

Oklahoma Constitution, Article II, Section 20, O.S.A.:

§20. RIGHTS OF ACCUSED IN CRIMINAL CASES

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf.

14th Amendment of the United States Constitution:

Section I:

"***nor shall any State deprive any person of life, liberty, or property, without due pro-

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On the night of February 12, 1974, at approximately 10:00 P.M., two men entered the Bartlesville home of Mr. and Mrs. Garland C. Richardson, and robbed them at gun point. Mrs. Richardson testified that the two men, both of which wore ski masks and gloves, took her and her husband into the den of their house, where Mrs. Richardson remained while the larger of the two men took Mr. Richardson to other parts of the house. The two men eventually took money from Mr. Richardson's billfold and from Mrs. Richardson's purse, and took Mrs. Richardson's ring. After this, the Richardsons were tied up and the men left. Only about twenty (20) minutes passed from the time the two men entered the house until they left. Mr. Richardson then took the stand and essentially corroborated his wife's testimony, although there was some discrepancy in the physical description of the two robbers and the guns they used.

Over this Petitioner's objections, the State next called Wayne Vermeulen, an inmate in the Arkansas State Penitentiary, who testified that himself, Cliff Blaylock, and this Petitioner, Leppke, had committed the robbery in question. His testimony only varies slightly from that of the Richardson's concerning the events of

the robbery, despite the fact he was vague on some details. The State then rested.

The defense produced three alibi witnesses and the Defendant/Petitioner himself took the stand in his own behalf. The defense first called Phillip Billie Jack Bryant who testified he worked for Leppke and had seen him in Tulsa at about 8:15 P.M. on the night in question. Next called was Jerry Hazel Lepple, Defendant/Petitioner's wife, who stated she was sure she left with her husband that night when they closed the Sin City Club, which she and her husband operated in Tulsa, Oklahoma. The defense then called Jack Benson, Petitioner's brother, who said he was at the Sin City Club with Leppke all night on February 12, and that Leppke was not out of his presence for more than ten (10) minutes all evening.

Robert Steve Leppke then testified in his own behalf and explained the events of February 12, 1974, in much the same way as did his brother.

Lewis Ambler, an Assistant District Attorney, testified he had shown certain pictures to Mr. Richardson. Mr. Leppke was recalled and identified a picture of himself. Wayne Vermuelen was called as a rebuttal witness for the State but added nothing of consequence to his earlier testimony.

PROPOSITION I

DID THE TRIAL COURT VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS OF DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL AS SET FORTH IN THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It should be noted that there are three (3) phases to be looked at under the Proposition heretofore set forth:

A. Suppression of the Evidence.

B. A Motion for Continuance.

C. Improper remarks made by the Prosecuting Attorney.

> (A) "The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined." *U. S. v. Wade*, 388 U.S. 218 (1967).

In the case at bar, against one Robert Steve Leppke, identification was the paramount issue. It is glaringly obvious from even a cursory reading of the preliminary hearing of the trial transcript that virtually every prejudicial and improper procedure possible was used during the investigative stage and as a result created a serious possibility that the in-court identification of Robert Steve Leppke made by the Richardsons, was improperly influenced by law enforcement authorities.

There is no possible conclusion other than this resulted in a miscarriage of justice and denied Petitioner herein his rights guarantying him a fair and impartial trial and due process under the law as provided for in the 14th Amendment of the United States Constitution.

From a statement given by one of the alleged victims, Mr. Richardson, immediately after the alleged robbery took place, Mr. Richardson was unable to identify either of the assailants by their faces (both assailants wore ski masks) but he (Richardson) was able to identify, later, the Petitioner herein from "his build". The statement taken some nine (9) days after the robbery occurred, Mr. Richardson freely admitted he did not get a very good look at either of the assailants.

In June, 1974, four (4) months after the robbery, Mr. Richardson was shown six (6) photographs and he stated that one of these was built similar to one of the robbers and Mr. Richardson was then advised that he had identified Robert Steve Leppke.

On August 14, some six (6) months after the incident and after Robert Leppke's name had appeared in the newspaper, Mr. Richardson was asked by the District Attorney, Lewis Ambler, to come to the jail and make an identification. Mr. Richardson then viewed Robert Steve Leppke in a small room where he (Leppke) was being fingerprinted by a deputy sheriff and at this time, he

(Richardson) was able to identify Robert Steve Leppke as one of the robbers. It should be noted that at first, Mr. Richardson could not identify anyone, but after being advised that one of the photographs shown him had a similar build and after being told this was one Robert Steve Leppke, and then Leppke's name appears in the paper and again Richardson is shown Leppke and advised that he is the one whose build is similar, at the police station, then the more positive Mr. Richardson becomes that this is one and the same person that committed the robbery upon himself and his wife. This identification goes back to the addage of suggestion and to plant the seed in one's mind, it will then germate into a full grown flower.

The Court in *Wade, supra*, also recognized:

> "---it is a matter of common experience that once a witness has picked out the accused, it is not likely that the witness will go back on his word later."

In *Foster v. California*, 394 U.S. 440, 443 (1969), the Court stated:

> "In effect the police repeatedly said to the witness, 'This is the man'. This procedure so undermined the reliability of the eye witness identification as to undermine due process."

In the case at bar, a similar situation has occurred. Time and time again, the State has pointed to the Petitioner, and in effect, told the Richardsons "this is the

man". Not to say that it was done intentionally, but the effect was still the same. In *Simmons v. U.S.*, 390 U.S. 377, 383 (1968), the Supreme Court went into great detail with reference to this type photographic identification:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal or seen him under poor conditions. Even if police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who resembles the person he saw, or if they show him the picture of several persons among which the photograph of a single such individual recurs or is in some way emphasized . . . Regardless of how the initial misidentification comes about, the witness thereafter to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."

In the case at bar, we have not only a picture being remembered but also a *name*, (emphasis added) given to the Richardsons by representatives of the State: The name of Robert Steve Leppke.

Another incident which severely prejudiced the Appellant/Petitioner occurred on August 14, 1974, where

Mr. Richardson made an in-person identification of Robert Leppke. It must be remembered that Mr. Richardson, up to this point, had seen a picture and had been given the name of Robert Steve Leppke. When Mr. Leppke was arrested on another charge, either the District Attorney or Mr. Richardson called the other about coming down and making identification. Mr. Richardson knew from some source, probably the paper, that Robert Leppke had been injured in the head. When he viewed him through a one-way mirror, these injuries were easily seen. It is here that he identified Robert Leppke as the man who was one of the robbers. Was this one-on-one lineup or showup unnecessarily suggestive? It is well established by case law that the Due Process clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and condusive to irreparable mistaken identification. *Kirby v. Illinois*, 406 U.S. 682 (1972), *Stovall v. Denno*, 388 U.S. 293 (1967).

It has long been condemned that a one-on-one identification is inherently unfair. And, as should be noted, that where courts have held that it was not unfair, it was where the victim could not attend a regular lineup or it was within a short period following the crime. In the present case, that type of situation does not exist. There was plenty of time to make sure that Robert Leppke got the fair trial that was his constitutional right. The procedure used in the case at bar deprived the Petitioner of that right.

(B) The Trial Court abused its discretion in not granting the Petitioner a continuance in the case at bar in that the District Attorney endorsed a witness two (2) days prior to trial and this should be noted that it was on a Friday and that the Petitioner's attorney, was not apprised of the situation until he arrived for trial on the following Monday. At this time, and completely throughout the trial, Petitioner's attorney made no less than seven (7) motions for continuance into the record and numerous motions and discussions with the District Attorney and the trial judge, were had outside the record for a continuance to be given time to seek out the witness himself and possibly other witnesses who would rebutt the evidence given by the State's witness. It should also be noted in the case at bar that the witness was an essential witness for the State in that he was the alleged accomplice of the Petitioner in the robbery. It should further be noted that this alleged accomplice was incarcerated in the State Penitentiary of Arkansas and not available for immediate interview (if he so chose to give one) and that this witness's testimony was known some two (2) weeks prior to trial by the District Attorney who could have easily endorsed him much sooner than he did.

One must look at the conduct of the Prosecuting Attorney through the trial, to his devious and investigative and procedural methods in the trial of the case at

bar. Again, and not to be redundant, the access to the witness or the possibility of submitting other witnesses who would probably be inmates of the same institution as this witness, would have required time to be able to properly cover these investigative aspects and as to witness's stature in this case, a defense counsel would be negligent in not proceeding along these lines in order he may properly represent his defendant but because of the distances, the jurisdictional questions, and the fact the District Attorney had more than ample time to endorse said witness, it is Petitioner's contention that the trial court erred and abused its discretion in not allowing the Petitioner a continuance until these matters could be properly investigated.

One must look at who is at fault under these circumstances, and it could only point to the District Attorney and not to the defense counsel who acted in a diligent manner throughout, advising the Court he wished for a continuance, advising the Court as to the notice given him and advised the Court of his need for additional time in which to properly investigate and to properly represent his client in this matter. See *Young v. U.S.*, 223 Fed. 941.

(C) The unprofessional conduct of the assistant District Attorney throughout the course of the trial and the improper statements made throughout the course of the trial and during closing arguments by the Assistant District

Attorney appealed to the passion and prejudice of the jury and resulted in the denial of a fair and impartial trial for Appellant.

The Appellant contends that from the very first the prosecutor acted in a deliberate unprofessional manner to try and prejudice the jury against him and prevent him from having a fair and impartial trial.

This started from the very first when the prosecutor introduced a witness who he had known about for two weeks to the jury. The prosecutor, fully knowing who this witness was, presented him to the court and asked him if he were John Doe. At that point, the witness stated he would take the Fifth Amendment. Such an obvious and theatrical move on the part of the District Attorney's office was highly prejudicial and appealed to the passions and prejudice of the jury to such an extent as to deprive the Appellant of his rights to a fair and impartial trial. (Tr. 182-185)

This dramatic ploy and other instances of unprofessional conduct on the part of the prosecutor were in direct contravention of the guidelines this Honorable Court has incorporated. These are the guidelines of the American Bar Association Standards For Criminal Justice concerning the behavior of prosecutors.

The prosecutor continued throughout the proceedings to prejudice the rights of the Appellant and appeal to the passions and prejudices of the jury in order to

prevent the Appellant from having a fair and impartial trial. A most blatant example of this began on page 290 of the trial transcript where the Appellant's wife was questioned:

"Q. Mr. Lanning: Prior to this date, have you ever come forward with this information before today?

Mr. Fransein: Now, Your Honor, I'm going to object to the form of the question.

Mr. Lanning: It's proper for the jury to know, Your Honor.

The Court: Well, she may answer.

Mr. Fransein: May I approach the bench, Your Honor.

The Court: Yes.

(Attorneys confer with Court off record, out of hearing of jurors and reporter, after which proceedings continue as follows:)

Mr. Fransein: At this time now comes the defendant and moves for a mistrial.

The Court: It will be overruled.

Mr. Fransein: Exception.

Mr. Lanning: Can you re-read the question please? (Last question read)

A. I don't know what information you are talking about.

Q. Information as to what your husband was doing on February the 12th, 1974, between 8:00 and 10:30 P.M."

A. No, I haven't

Q. To no court official?

A. No

Mr. Fransein: May I have a continuing objection, Your Honor, to this line of questioning?

The Court: Yes, sir.

Q. No member of the law enforcement?

A. I don't know what you're talking about. I really don't.

Q. Well, don't you think what you are saying is relevant, saying your husband was at the club from 8:00 through 11:00. Is that not relevant?

A. Well, yes. I'm sorry. I don't understand what you're getting at.

Q. Well, my point is you have never come forth with information before today here in court some fourteen months after the charges have you?

Mr. Fransein: Your Honor, for the record, again I would like the objection heretofore made.

The Court: All right, sir. Well, she has answered the question. It is repetitous. She hasn't come forward is what she said.

Q. Mr. Lanning: That's correct? You have not come forward?

A. Well, who was I suppose to come and tell?

Q. Well, have you come forward to any member of the District Attorney's office?

A. I have told my attorney.

Q. Any law enforcement officer or any police officer?

A. No, I have said that twice now. (Tr. 290-29)

This was highly predudicial and left a clear inference that the Appellant and his wife failed to come forward because they were lying. On page 393 of the trial transcript the prosecuting attorney told the jury:

> "Let me just, in general, point out one thing as to the testimony of Mrs. Leppke that I found interesting. I don't know if you did or not. In response to my question to her about why had you never come forward with this information in some fourteen months, she appeared to be stupefied or surprised that there was anything significant about what she was saying, and why should anybody, you know, care if she come forward. What is so important about that? Very calm. Very casual. But obviously that is what the whole case is about is whether or not Mr. Leppke was there on the evening or not. And she acted so surprised that we would even ask or be interested in her coming forth at this point in time and providing this information So consider her demeanor and how very calm." (Tr. 393-394)

This was an obvious attempt to deny the Appellant his constitutional rights and is fundamental error that cannot be overlooked. In a similar Oklahoma case where the defendant was asked if either herself or her parents had reported certain facts to the police, this Court held:

> "It is the opinion of this Court that the cross examination of the witness concerning her failure and the failure of her parents to come forward and make a statement prior to trial and the closing argument stressing same constitutes fundamental error on behalf of the prosecuting attorney. The Defendant had a clear constitutional right to remain silent from the moment she became a suspect. The prosecuting attorney's comment upon the defendant's failure to make a statement or to raise her defense of an alibi prior to trial constitutes a clear, fundamental and reversible error on the State's part." *Buchanan v. State*, Okl. Cr. 523 P.2d 1134; *Miles v. State*, Okl. Cr. 525 P.2d 1249; *O'Brien v. State*, Okl. Cr. 540 P.2d 579; *Deats v. Rodriguez*, 477 F.2d 1023 (10th Circuit 1973)

The prosecutor immediately commented on the demeanor of the Appellant himself after his comments about the Appellant's wife. (Tr. 394)

In his closing argument, the prosecutor again and again attempted to incite the passion of the jury.

> ". . . I assure you it wouldn't be unusual for a person in his position, knowing that Mr. Leppke as he says, was with him on the robbery, was coming to trial, that maybe Mr. Leppke would talk against him and name him first . . ."(Tr. 387)

> ". . . If you want to believe that or accept that, that is, of course, up to you. Then I think that you are making light of their testimony and the kind of people they are. You have heard them testify." (Tr. 396-397)

> "I would like to answer one thing as far as the stolen car that Mr. Vermuelen has testified to if we had tried to put on an officer we would have heard an objection about trying to bolster our own witness." (Tr. 420)

> "I think from the evidence that you now have, that has been presented to you, from that evidence you can protect some other couple from this man right here. You can imagine out

at the, their ranch home they will no longer be leaving the door unlocked at night. They may have a bar across the door now or an alarm at their house now. They didn't have that before but they do now. They can't stay in their home with the same peace and serenity that they once had. They can't sit home on a quiet evening without fear in their minds. They will never get over the experience of two men kicking on their front door and putting them on the floor of their den. I think from the evidence it doesn't make any difference whether it was $1.00 or $5,000 What is significant is that two men come in with a pistol you have to assume they are prepared to use it, to take lives, if necessary, to get that cash to get those diamonds that's why they bring them." (Tr. 421)

It is replete throughout the trial transcript and the investigative and preliminary aspects of the trial, that one should look to the conduct of the District Attorney. As set forth, he is a public officer and should use reasonable and lawful means to secure a conviction.

The belief that the criminal trial should be a balanced contest between adversaries has long been criticized as a "sporting theory of justice" which is particularly inappropriate in light of the high stakes involved in criminal litigation. The "sporting theory" appears to embody two concepts; equal opportunity to prevail in the litigation and wide latitude for skillful trial maneuvers. Any suggestion that the State must have at least as good a chance as the defendant to prevail would seem to violate the traditional policy of favoring the defendant in

order to avoid conviction of the innocent. Insofar as the sporting theory suggests that broad disclosure is undesirable as an infringement upon the opportunity for ingenuity in the use of trial tactics, it would seem to conflict with the duty of the State's prosecutor to seek results which are in accord with the facts rather than to achieve a record of indiscriminate convictions.

It is possibly best stated, in light of probably the most cited case as to proper conduct that should be used in the course of a trial, as set out in *Berger v. U.S.*, 55 S.Ct. 629, 295 U.S. 78, 79 L.Ed. 1314:

> "In the trial of a criminal case, an important duty and responsibility are imposed upon the Prosecuting Attorney, and it is his duty to see the Government's case is presented with earnest and vigor, and to use every legitimate means to bring about a just conviction, but he has the duty to refrain from improper methods calculated to produce a wrongful conduct and while he may strike hard blows, he may not strike foul ones."

See also, *U.S. v. Bourjaily*, 167 Fed.2d 993 (in the body of the Opinion).

> "The whole interest of the Government in any criminal case is not to win at any cost, but rather that justice shall be done."

See also *U.S. v. Dresser*, 112 F.2d 972:

> "It is inconsistent without traditional conception of a fair trial to permit any information

to go to a jury which might influence a jury to convict a defendant for any reason other than he is guilty of the specific offense with which he is charged."

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Filed in Court of Criminal Appeals, State of Oklahoma, January 24, 1977. Ross N. Lillard, Jr., Clerk.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA
No. F-76-359
ROBERT STEVE LEPPKE,
Appellant,

vs.

THE STATE OF OKLAHOMA,
Appellee.

OPINION

BUSSEY, JUDGE:

Appellant, Robert Steve Leppke, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Washington County, Case No. CRF-74-452, for the offense of Robbery by Fear, in violation of 21 O.S. 1971, §791. His punishment was fixed at eleven (11) years' imprisonment, and from said judgment and sentence a timely appeal has been perfected to this Court.

The State's first witness was Margaret E. Richardson, who testified that on February 12, 1974, at approximately 10:00 p.m., she and her husband were alone in their home located about ten miles south of Bartlesville, when they heard a knock on their front door. As both arrived at the door, it was opened and in stepped two men, one large in stature, the other smaller,

each brandishing a pistol. They had their heads covered with ski masks and their hands with gloves. She described the dress and approximate size of both men: the larger man being 190 pounds and almost six foot tall, and dressed in khakis; the smaller man was about five foot six or seven and about 135 pounds, and dressed in dark clothing. Mrs. Richardson said she was ordered into the den with the smaller man, while her husband went with the larger man. She testified the larger man did nearly all the talking. When Mr. Richardson and the larger man returned to the den, Mrs. Richardson testified she noticed the larger man no longer wore his gloves and described his hands as "well groomed," with no evidence of hard work. The larger man then took Mrs. Richardson's diamond ring. Mr. Richardson then handed his billfold to the larger man. During this exchange Mrs. Richardson said she could observe the eyes, nostrils and teeth of the larger man. The larger man next removed approximately $80.00 from her purse, and after binding both Mr. and Mrs. Richardson, the two men left the house. The witness described the head of the larger man as well-rounded and a wide forehead. He had teeth that were very white and even, large eyes, and a light complexion, although she could not testify as to the color of the larger man's eyes. His eyebrows were described as "bushy." His physical characteristics she described as broad shoulders, big arms, large through the abdomen and full thighs. She then identified the defendant as the larger man who was in her house that night. The witness testified that in May, 1974, she was shown more than a dozen photographs by the Sheriff and picked out one that resembled the larger man. She next saw that man during a court hearing on September 25, 1974.

On cross-examination the witness testified that the two men were inside the house about twenty minutes.

Mrs. Richardson testified that she was shown a group of different (about six) photographs at the preliminary hearing in September, 1974, and the defendant's photo was among them. The defense asked the defendant to stand and Mrs. Richardson said he was the same man who entered her house on February 12, 1974, although he had lost some weight.

On re-direct, Mrs. Richardson testified she made her identification in the courtroom that day based on the man who entered her house the night of February 12, 1974, not on any photographs she had been shown.

The next witness was Garland C. Richardson, husband of the prior witness. He described the two men: over six feet and over 200 pounds for one man and five foot nine and 150 pounds for the other man. He said the ski masks worn by the men were so tight he could pick out their features under those masks. He testified that $317.00 was taken from his wallet by the larger man and placed the value of his wife's diamond ring at $5,000.00. He testified to having taken college courses on the human body as a physical education student, and he described the larger man as large in stature, big shoulders, heavily muscled arms and back, heavy thighs and buttocks, distinctive ears, distinctive forehead, and he added that "this cap accentuates the ability to describe the gentleman." Richardson testified that when he observed the defendant in August, 1974, he "very definitely" recognized his walk as that of the larger man who entered his house on February 12, 1974. He also recognized the defendant's voice as belonging to the larger man. He said his courtroom identification was based on events of February 12th, and added, "the pictures (he was shown) only confirm it."

On cross-examination Richardson testified that he observed the defendant on August 14th through a one-way mirror in a one-on-one identification at the police station.

The next State's witness was Wayne Vermeulen, who testified that he resides at the Arkansas Penitentiary and had been convicted in Arkansas of the crimes of Grand Larceny and Burglary, and is serving a sentence of eight years. He also was convicted of a federal crime of Possession of Firearms, he said. Vermeulen said he was five foot nine inches tall and weighed 135 pounds. He said he had known the defendant for one and one-half to two years, and met him in the Sin City Club in Tulsa. Out of the jury's hearing, the Assistant District Attorney said the witness came forward on his own volition and no promises were made to him.

The court granted the witness immunity from prosecution after he pleaded the Fifth Amendment. The witness then admitted that he was the John Doe named in the Information, that he did take part in the robbery at the Richardson's house. He said the idea for the robbery was born at the Sin City Club which was owned and managed by the defendant and that the defendant himself conceived the plan. He said a Cliff Blaylock was also involved, and that he (Blaylock) is currently in the Arkansas Penitentiary. He testified that on the evening of the robbery the three met in the office of the defendant at the club and there they secured ski masks, tape and gloves. He said the defendant had obtained two .38 caliber guns. Vermeulen said he stole a car in Bartlesville, he described the ski masks they wore as nave blue in color and tight-fitting, especially tightfitting on the defendant. Vermeulen said he was dressed in

bluejeans and a green army shirt. He said the defendant was wearing a pair of charcoal gray, nylon or rayon slacks. He said while he and the defendant entered the Richardson's house, the third man, Blaylock, remained in the car. He described the geographical layout of the Richardson's house and of overhearing a telephone conversation of Mr. Richardson just before they entered the house. The rest of his testimony fairly followed that already given by Mr. and Mrs. Richardson as far as the movements of the Richardsons and the two men in and around the Richardson's house. He said that when they left the Richardson's house they returned to the defendant's office in the Sin City Club to divide the stolen money. He also identified the defendant as the Robert Leppke with him that night.

He said that his appearance in court was voluntary, although he acknowledged that he was subpoenaed. He said he voluntarily told authorities about his role in the robbery and identified Leppke as also taking part in it. He said he was promised nothing in return for his testimony, although the defense attorney noted that the witness received immunity from prosecution for his testimony.

On cross-examination, he testified that some time after the robbery the defendant came to Springdale, Arkansas, to tell him and Blaylock that he (the defendant) had been arrested for the Richardson robbery. He admitted that the height and weight of Blaylock are similar to the defendant. Thereafter, the State rested.

The defense called as its first witness Phillip Billie Jack Bryant, II, who stated he was a bartender at the Sin City Club in Tulsa, managed by the defendant, at the time of the robbery. He testified he was "positive" that the defendant was in the club on the night of February

12, 1974, at about 8:00 p.m., but he did not recall how long the defendant stayed at the club that night.

The defense next called Jerry Hazel Leppke, the defendant's wife, who stated she was employed by a petroleum company during the day, and that she and her husband worked as managers of the Sin City Club in the evenings during the month of February, 1974. She said she could remember the night of February 12, 1974, because her husband's Uncle Jack was ill, "on the verge of dying," and in fact he did die two or three days later. She said she arrived at the club at 8:00 p.m. on February 12th and on most nights went home at 10:30 p.m. She testified that her husband had not left the club that night of February 12th for one or one and a half hours, or more. She testified both she and her husband knew Cliff Blaylock through the club. She said she and her husband left the club about 2:30 a.m. the morning of February 13, 1974, the night of the robbery. She said she remembered that week in February because her brother-in-law, Jack Benson, came to town, and she picked him up at the airport on February 12th.

The next defense witness was Jack Benson. He testified he arrived at Tulsa Airport at 7:55 a.m. on February 12th, and was picked up by his sister-in-law, Mrs. Leppke. He said he dropped her off at her job and went to the house of his brother, the defendant. He testified he and his brother went to the club the night of February 12th at about 8:00 p.m. or 8:30 p.m., and his brother was out of sight that evening for no more than ten minutes at a time. He testified that the drive from the Sin City Club to the Richardson house and back takes about three hours. He said he, the defendant and Jerry left the club at 2:00 a.m. that morning.

The next witness for the defense was the defendant, Robert Leppke. He testified he had met Mr. Richardson in 1971, when he asked him about hauling hay. He testified that on the day of February 12, 1974, he was six feet tall and weighed 246 pounds, and that he now weighs 205 pounds. He said he was in his club at 8:00 p.m. on February 12th and was there when it closed at 2:00 a.m. He said he knew Wayne Vermeulen when he was introduced to him at his club, and has seen him at most six times since then. He said he usually goes to Arkansas to watch the Tulsa University-Arkansas University football game and on one trip he stopped in Springdale to say hello to Cliff Blaylock and said he saw Vermeulen who worked for Blaylock at the time. He said he remembers February 12th because his uncle died shortly thereafter. He said he had a forty-four inch waist in February, 1974, not the trim waist described by Richardson.

On cross-examination he said he knows Cliff Blaylock socially, that Blaylock had been to his house once or twice. He said he believes one of the Blaylock brothers introduced him to Wayne Vermeulen.

The defense rested and the State called as rebuttal witness, Wayne Vermeulen. He testified that in August, 1974, the defendant and Cliff Blaylock came to Springdale, Arkansas, and called him off the job. The defendant's wife was with him in the car. He did not see Jack Benson in the Sin City Club on the night of the robbery. On cross-examination, he said he had been to the defendant's house on three occasions. Thereafter, the State rested.

The defendant's first assignment of error is that the trial court should have suppressed the in court identification of the defendant by the Richardsons, due to improper pretrial identification of the defendant.

This is a claim which must be evaluated in light of the totality of the surrounding circumstances. *Stovall v. Denno*, 388 U.S. 293, S.Ct. 1967, 18 L.Ed2d 1199 (1967). Viewed in this context we find the claim is without merit. Viewing the record as a whole, we find Mr. and Mrs. Richardson were in the presence of the defendant for about twenty minutes, during which time they testified they had ample opportunity to observe his physical characteristics. Their testimony at trial was very specific. They also testified that their in-court identification was based on their personal observations at the time of the robbery, not on the pretrial identifications.

Ford v. State, Okl.Cr., 532 P.2d 89 (1975) is a weaker fact situation than the case at bar, yet we upheld it. In *Ford*, the robbery victim was called down to the police station to view two captured suspects, later convicted of the crime. He identified each one out of the presence of the other, and alone. The trial court held a pretrial hearing to determine the identification issue, and overruled the defendant's motion to suppress in court identification. This Court said:

> ". . . We fail to find that the trial court abused its discretion in permitting the in court identification."

We then found that assignment of error to be without merit.

In *Hazelwood v. State*, Okl.Cr., 538 P.2d 1072 (1975), the robbery victim examined six photographs of individuals of similar size and build, and picked out the defendant. His in court testimony recalled in detail the features of the defendant. We concluded there, that the in court identification was based on the witness' observation of the defendant at the scene of the robbery, rather than on the pretrial identification procedure.

The Supreme Court of the United States has held that a pretrial identification procedure is unconstitutional if it "was so unnecessarily suggestive and conductive to irrepairable mistake identification that (the accused) was denied due process." *Stovall v. Denno, supra.* If the pretrial confrontation or viewing of the accused is "so impermissibly suggestive as to give rise to a very substantial likelihood of irrepairable misidentification" then the witness having viewed the accused under such suggestive circumstances, may not be allowed to identify the accused during trial. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). We find this not to be the case here, based on the long time the Richardsons had to observe the defendant and their detailed identification they gave at the trial. The photograph identification was conducted in an unprejudicial manner, and while the viewing in the police station through the one-way mirror perhaps should not have taken place, we view it as harmless error in light of all the other circumstances.

Defense counsel points to the Richardsons' sworn statement taken nine days after the robbery, the preliminary hearing testimony taken seven months after the robbery, and the trial testimony taken eighteen months after the robbery, and calls the comparisons "remarkable," and "miraculous" because the Richardsons' descriptions of the robbers became more detailed with each examination. We note, however, that Mr. Richardson pointed out the defendant, at the preliminary hearing, as "very definitely" the larger man who robbed him, and he testified, "I did observe him carefully as to physique, movements, things like that," but he was only asked to

elaborate on that statement at trial. He was asked about his viewing of the defendant at the police station:

> "Q. Is your identification here today of Mr. Leppke as the man who robbed you, is that based on the picture of the man you saw in the photographs, or the man, the viewing you had of a man on the night of February 12th?
>
> "A. Well, of course, my identification is on the 12th. The pictures only confirm it. The identification was back there, plus here."

We find the defendant's first assignment of error to be without merit.

The defendant's second assignment of error is that the trial court abused its discretion in overruling the defendant's application for continuance based on the State's endorsement of an additional witness two days prior to trial. The defendant claims he did not receive personal word of the endorsement until the day before trial and could find out nothing in that brief time for use in effective cross-examination. He cites as authority *Plumlee v. State*, Okl.Cr., 361 P.2d 223 (1961), as to the good faith of the county attorney in endorsing witnesses after trial has begun.

But *Plumlee* also agrees with *Evans v. State*, Okl.Cr., 312 P.2d 908 (1957), which states in the third paragraph of the Syllabus:

> "The trial court may permit the name of an additional witness to be endorsed on the information even after the trial has begun; and the Criminal Court of Appeals will not interfere with the action of the trial court unless the record clearly shows an abuse of discretion."

In the body of the opinion in *Evans v. State, supra*, we said that *Paschall v. State*, 96 Okl.Cr. 198, 252 P.2d 175, set forth the procedure for the surprised defendant to follow:

> " 'If defendant's counsel is surprised at such action and such endorsement of an additional witness requires a production of further testimony by defendant, he should withdraw his announcement of ready for trial and should file a motion for a postponement or a continuance in which he should set out the facts constituting such surprise, and the other evidence, if any, he could produce to rebut the testimony of such additional witness if the trial of the case was continued. Where he fails to do this the error, if any, is waived.' "

Defense counsel knew of the endorsement the day before the trial began. He announced ready for trial on the first day of trial, and did not later move to withdraw that announcement. When the endorsed witness was called to testify, counsel asked the court to dismiss any testimony he might make. No motion for continuance was made until after the State had rested its case. Accordingly, the second assignment of error is without merit.

The defendant's third assignment of error is that the prosecutor's conduct during the trial and his improper statements appealed to the passion and prejudice of the jury and so denied the defendant a fair and impartial trial. We disagree. Defendant points to the witness Vermuelen taking the Fifth Amendment while on the stand and argued this "appealed to the passions and prejudice of the jury." There is no evidence in the record indicating the prosecutor knew that the witness would plead the Fifth Amendment on the stand, so we cannot

say he was guilty of misconduct. But even if the prosecutor had known, we have not been convinced that the witness' statement and the prosecutor's conduct "influenced the verdict against the defendant." *Samples v. State*, Okl.Cr., 337 P.2d 756 (1959).

Counsel points to questioning of defendant's wife as to why she did not report to authorities the fact that the defendant had been in the club all during the night in question. The Court, on numerous occasions, had distinguished the right of an accused to remain silent from the assertion of that right as applied to third persons. See, *Walker v. State*, Okl.Cr., 550 P.2d 1339 (1976). Counsel points to comments in the closing argument of the prosecutor. However, no proper defense objections were made to the statements by the prosecutor and if proper objections are not made during the course of the trial, the defendant is deemed to have waived any right to raise his objections on appeal. As we said in *McCall v. State*, Okl.Cr., 539 P.2d 418:

> ". . . It is a well established rule that when an objectionable statement is made by the prosecution, it should be called to the attention of the court by timely objection, together with the request that the jury be instructed to disregard the improper statement . . ."

We, therefore, find the defendant's third assignment of error to be without merit.

The defendant's fourth assignment of error goes to the proposition that there was insufficient evidence to corroborate the testimony of the admitted accomplice, Wayne Vermeulen. This is clearly incorrect if the Richardsons' testimony, and especially their identification of the defendant, is to be believed. The defendant speaks

of "circumstantial" evidence, but surely he would not contend that the Richardsons' identification is circumstantial.

But even circumstantial evidence can be sufficient to corroborate an accomplice's testimony. *Brown v. State*, Okl.Cr., 518 P.2d 898 (1974).

In *McManus v. State*, Okl.Cr., 516 P.2d 277 (1973), we stated:

> ". . . The rule generally stated provides that when no evidence except that of the accomplice tends to connect defendant with a burglary, the evidence is insufficient to sustain a jury's verdict. . . ."

The *McManus* test has clearly been met by the testimony of Mr. and Mrs. Richardson, who were quite definite in their identification of the defendant.

The required corroboration need not encompass every fact. As we said in *Hambrick v. State*, Okl.Cr., 535 P.2d 703 (1975):

> ". . . Clearly, the law in this State states that a defendant may not be convicted on the uncorroborated testimony of an accomplice. It is also the law in this State that an accomplice's testimony need not be corroborated as to every material point. If the accomplice is corroborated as to one material fact, or facts, by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all. . ."

In the case at bar, witness Vermeulen concurred with the Richardsons' testimony as to the time and date of the robbery, the physical description of the robbers, the

sequence of events that occurred in the Richardsons' house, and even as to overhearing Mr. Richardson's long-distance telephone conversation before he and the defendant entered the house.

This Court will view corroborating evidence in the strongest light. In the early case of *Key v. State*, Okl.Cr., 259 P. 659 (1927), we held, in the third paragraph of the Syllabus:

> "Where the sufficiency of the evidence to corroborate an accomplice is challenged, this court will take the strongest view of the corroborating testimony that such testimony will warrant, and, if it can say that there is corroborating evidence tending to connect the defendant with the commission of the offense, it will uphold the verdict."

And, in *Haas v. State*, Okl.Cr., 257 P. 1115 (1927), we held, in the first paragraph of the Syllabus:

> "Where there is evidence in corroboration of an accomplice, tending to connect a defendant with the commission of the crime charged, the sufficiency of such corroborating evidence is for the jury."

Collier v. State, Okl.Cr., 520 P.2d 681 (1974), had a similar fact incident to the case at bar. In *Collier* the accomplice was given immunity from prosecution to testify against the defendant. The only corroborating evidence (the victims could not identify the defendant) was a description of the defendant's car and the defendant's initials given to the police by the accomplice. The sherrif found the car in question with the defendant inside and this Court affirmed that conviction. As stated above, the present fact situation is far stronger than *Collier*, and so

we find no merit in defendant's fourth assignment of error.

For the defendant's fifth assignment of error, he states that the accumulation of errors and irregularities in the trial, when considered as a whole, deprived him of a fair trial under constitutional due process guarantees. This Court has ruled before that when the prior assignments of error have been found without merit, so will an assignment of this nature. *Murray v. State*, Okl.Cr., _____ P.2d _____ (F-76-576, 47 O.B.J. 2726).

For the above and foregoing reasons, the judgment and sentence appealed from is accordingly AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT,
WASHINGTON COUNTY, OKLAHOMA,
HONORABLE MERMON H. POTTER, JUDGE

ROBERT STEVE LEPPKE was convicted of the crime of Robbery by Fear; his punishment was fixed at eleven (11) years' imprisonment, and he appeals.
AFFIRMED.

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OPINION BY BUSSEY, J.,
BLISS, J., Concurs,
BRETT, P.J., Dissents.